

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RUDY ST. GERMAIN, MICHELLE  
ROBERTS, enrolled Nooksack Tribal members,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
INTERIOR; BUREAU OF INDIAN AFFAIRS;

Defendants.

NO. \_\_\_\_\_

COMPLAINT FOR INJUNCTIVE  
RELIEF

**I. INTRODUCTION**

1. On March 8, 2013, Plaintiffs submitted a Freedom of Information Act (FOIA) request to Defendant Bureau of Indian Affairs (“BIA”) seeking information pertaining to federal action related to disenrollment proceedings of the Nooksack Indian Tribe, including their own proposed disenrollment.

2. As a matter of federal law, Defendants must carry out the United States’ common law and statutory trust duty to Plaintiffs, as Native Americans and enrolled members of the Nooksack Tribe. *See generally Loudner v. U.S.*, 108 F.3d 896 (8th Cir. 1997).

3. Despite that duty, and the obligations imposed upon Defendant BIA under FOIA – not the least of which is to provide Plaintiffs non-exempt responsive information within twenty days of receipt of their FOIA request pursuant to 5 U.S.C. § 552(a)(6)(C)(I) – Defendants have failed to disclose information to Plaintiffs.

4. Plaintiffs request that the Court order Defendants to disclose any non-exempt information that is responsive to their March 8, 2013, FOIA request.

## II. PARTIES

5. Plaintiffs Rudy St. Germain and Michelle Roberts (“Plaintiffs”) are enrolled members of the Nooksack Tribe, a federally recognized Indian tribal government (“Tribe”), and residents of the Nooksack Indian Reservation. Plaintiffs are citizens of the State of Washington and elected members of the Nooksack Tribal Council. Plaintiffs bring this suit in their individual capacities.

6. Defendants the United States Department of Interior (“Interior”) and the BIA, are agencies and instrumentalities of the United States.

### III. JURISDICTION

7. The District Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

8. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B).

## IV. FACTS

9. On March 8, 2013, Plaintiffs filed the subject FOIA request with the BIA, narrowed as to both scope and time span insofar as Plaintiffs sought six discrete categories of information, “generated or dated within the last twelve (12) months”:

Any and all documents, records, correspondence, notes, faxes, voicemails, emails or other information, which refer or relate to:

1. Any disenrollment of any Nooksack Tribal Member;
2. Any communication or meeting between any Nooksack Tribal Councilperson or Tribal Member and any Department of the Interior, Bureau of Indian Affairs or other federal employee regarding the membership or disenrollment of any Nooksack Tribal Member;
3. The eligibility or ineligibility of any person or group of persons to be Nooksack Tribal Members;
4. The possibility of Department of the Interior Secretarial ("Secretarial") approval of any employment of attorneys of record or counsel, or related

fixing of attorneys' fees, by the Nooksack Tribe or Tribal Council;

5. The possibility of any amendment, or Secretarial approval of any amendment, to Title 63, the Membership Ordinance of the Nooksack Tribe; or

6. The possibility of any Secretarial election concerning any amendment to the Constitution and Bylaws of the Nooksack Indian Tribe of Washington.

10. Plaintiffs also sought the information in the subject FOIA request through "the United States' trust responsibility to them both as Nooksack Tribal Members."

11. On March 11, 2013, Plaintiffs' received correspondence from Stanley M. Speaks, Regional Director for the Northwest Regional Office of Defendant BIA, acknowledging receipt of Plaintiffs' information request. Director Speaks categorized Plaintiffs as "an 'other use' requester," notwithstanding their status as enrolled Nooksack Tribal members and thus federal Indian trust beneficiaries, and therefore proposed to charge Appellants hourly research rates ranging from \$6.00 to \$15.00 ("minus two hours free"), and copy charges of \$0.15 per page (with the first "100 pages free"). Director Speaks explained that Plaintiffs "did not request a fee waiver and did indicate your willingness to pay [sic] FOIA processing fee."

12. On March 15, 2013, Plaintiffs responded to the BIA, explaining, "since we are requesting records on behalf of enrolled Nooksack members and trust beneficiaries, we request a fee waiver." Plaintiffs continued: "Kindly let us know if that is acceptable. In any event, please do not allow these issues to delay your processing of our clients' information request. We need the records within the time period set forth under federal law."

13. On March 19, 2013, Marie Howerton, FOIA Coordinator for the Northwest Regional Office of Defendant BIA, emailed indicating that she did not "receive [Appellants'] request until 3/11/2013," even though it was emailed and faxed to her on March 8, 2013. Ms. Howerton noted that Appellants "are requesting a fee waiver as . . . enrolled Nooksack members and trust beneficiaries." Then, after Director Speaks had on March 15, 2013, confirmed Plaintiffs' "willingness to pay [sic] FOIA processing fee," Ms. Howerton

1 misrepresented that Plaintiffs “did not agree to pay fees.” As such, Ms. Howerton indicated the  
2 matter of fees and fee waiver “will be forwarded to [her] Solicitor for legal sufficiency.”

3 14. In response, on March 19, 2013, the undersigned counsel emailed Ms. Howerton,  
4 explaining that Appellants “Despite how it might seem, I do appreciate your help as do my  
5 clients [who] are being threatened with tribal disenrollment . . . so they’d be especially grateful  
6 for your timely production of the documents.”

7 15. On March 26, 2013, not having received any further response from Director  
8 Speaks or Ms. Howerton, Plaintiffs wrote to her: “Has any decision been made on  
9 [Appellants’] request for a fee waiver? Also, with 20 days from March 11 soon to lapse, can  
10 we expect to receive documents by then?”

11 16. On March 28, 2013, Plaintiffs received a letter dated March 28, 2013, from  
12 Director Speaks, indicating for the first time that Plaintiffs’ information request for six discrete  
13 categories of information “generated or dated within the last twelve (12) months,” was being  
14 “placed in the complex multi-track process.” As such, Director Speaks indicated the Defendant  
15 BIA “may take between twenty-one to sixty days to process [Appellants’] request.” Further,  
16 despite confirming Plaintiffs’ “willingness to pay [sic] FOIA processing fee” on March 15,  
17 2013, Director Speaks reversed course to suggest that Appellants “did not indicate any  
18 willingness to pay [sic] FOIA processing fee.” Director Speaks indicated that Plaintiffs’ request  
19 would not “be processed until this clarification is provided.”

20 17. In turn, later in the day on March 28, 2013, Plaintiffs wrote to Ms. Howerton in  
21 reference to Director Speaks’ March 28, 2013 letter:

22 In the interest of time, with time being of the essence for our clients as I  
23 previously indicated, we hereby abandon our request for fee waiver and agree to  
24 incur the expense associated with your agency's FOIA production efforts. We  
25 do so without waiver of our position that our clients are Nooksack tribal  
members and Indian trust beneficiaries who should not be charged for the  
records sought.

We look forward to receipt of all responsive documents within 20 days of your  
acknowledged receipt of our FOIA request, as is required by federal law. If we  
do not receive all such documents by then, please be further advised that we will

1 promptly appeal your agency's inaction to the Interior FOIA Appeals Office, of  
2 course copying you.

3 Please appreciate that our clients simply cannot afford any undue delay in this  
4 regard. Thank you.

5 18. On May 7, 2013, almost two months to the day after Plaintiffs' initiated their  
6 information request, Director Speaks wrote Plaintiffs, requesting advance payment of  
7 \$2,302.20, for 868 pages of responsive information.

8 19. On May 23, 2013, Plaintiffs and Defendant BIA agreed that Plaintiffs would pay  
9 Defendant Interior \$1,1501.10 for those 868 pages of responsive information, provided those  
10 documents be produced to Plaintiffs by early the week of May 27, 2012.

11 20. On May 24, 2013, Plaintiffs issued Defendant Interior a check in the amount of  
12 \$1,1501.10.

13 21. Meanwhile, on April 24, 2013, Plaintiffs initiated an administrative appeal of the  
14 BIA's inaction as of that date, to Defendant Interior's FOIA Appeals Office in Washington,  
15 DC. In violation of Defendant Interior's own FOIA administrative appeal regulations,  
16 Defendant Interior has not accepted or denied, or even acknowledged receipt of, Plaintiffs'  
17 administrative appeal.

18 22. As of today, now nearly three months after initiating their information request to  
19 Defendant BIA, Plaintiffs have yet to receive one page of responsive information.

20 23. In addition to violating FOIA itself, Defendant BIA's refusal to apply information  
21 violates President Obama's Memorandum regarding FOIA, which provides in pertinent part:

22 The Government should not keep information confidential merely because  
23 public officials might be embarrassed by disclosure, because errors and failures  
24 might be revealed, or because of speculative or abstract fears. Nondisclosure  
25 should never be based on an effort to protect the personal interests of  
Government officials at the expense of those they are supposed to serve. In  
responding to requests under the FOIA, executive branch agencies (agencies)  
should act promptly and in a spirit of cooperation, recognizing that such  
agencies are servants of the public.

President Barack Obama, Memorandum for the Heads of Executive Departments and  
Agencies, 74 Fed. Reg. 4693 (Jan. 21, 2009) (emphasis added); *see also George v. C.I.R.*, T.C.

1 Memo. 2006-121, 2006 WL 1627980, at \*2 (U.S. Tax Ct. Jun. 13, 2006) (“The fundamental  
 2 principles of the Executive order are to continue to recognize the Indian tribes as domestic  
 3 dependent nations under the protection of the United States, work with the Indian tribes on a  
 4 government-to-government basis, and recognize the right of Indian tribes to self-government  
 5 and support tribal sovereignty and self-determination.”).

6  
 7 24. Defendant BIA has acted neither promptly, nor in a spirit of cooperation with  
 8 Appellants. Instead, Defendant BIA has created confusion (e.g., the fee/waiver issue); extra  
 9 process (i.e., a “multi-track process”); and delay (“between twenty-one to sixty days,” now  
 10 going on ninety days). Defendant BIA has patently violated FOIA.

11 25. In addition to violating FOIA, Defendant BIA has and continues to violate its  
 12 trust and fiduciary duties to Plaintiffs, as enrolled Nooksack Tribal members, by failing to  
 13 provide responsive information.  
 14

## 15 **V. CAUSE OF ACTION**

16 26. Plaintiffs hereby incorporate and reallege the foregoing Paragraphs.

17 27. Defendants’ refusal and failure to provide the requested documents, and their  
 18 current withholding of such documents, violates FOIA.

19 28. Defendants’ failure to answer Plaintiffs’ requests and subsequent appeal of that  
 20 inaction violated FOIA.

## 21 **V. RELIEF**

22 WHEREFORE, Plaintiffs prays that the Court:

23 A. Order Defendants to disclose the requested records in their entirety and make  
 24 copies available to Plaintiffs;

25 B. Preliminarily and finally enjoin Defendants from withholding from Plaintiffs the  
 records requested;

1 B. Award costs and attorneys fees, pursuant to 5 U.S.C. § 552(a)(4)(E);

2 C. Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the  
3 circumstances surrounding the withholding – particularly the breach of Defendants’ trust  
4 obligations owed to Plaintiffs – was an arbitrary and capricious act having no basis in law; and,

5 D. Grant Plaintiffs such other and further relief as the Court deems just and proper.

6 Plaintiffs reserve the right to amend this Complaint to plead new parties, claims and/or  
7 allegations.  
8

9 DATED this 31st day of May, 2013.

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